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85-5116

Supreme Court, U.S.
FILED
JUL 26 1985
ALEXANDER L. STEVAS
CLERK

In the

Supreme Court of the United States

October Term, 1985

No. A-926

ORIGINAL

RICHARD P. LUCAS,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD JUDICIAL DEPARTMENT.

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OPINIONS BELOW

A judgment of conviction was rendered against this petitioner after jury trial of all counts in the Indictment on July 14, 1978. An appeal was taken to the New York State Appellate Division, Third Judicial Department, and an order was entered on July 20, 1979 modifying on the law and the facts the judgment of the County Court of Sullivan County by reversing the conviction for Kidnapping in the First Degree and Robbery in the

First Degree and dismissing those counts and as modified, affirmed the judgment convicting the petitioner of two counts of Murder in the Second Degree (see People v. Lucas, 73 A.D. 2d 699). On appeal, the New York State Court of Appeals on March 26, 1981 reversed the judgment of conviction and ordered a new trial upon the grounds that the admission made by the petitioner should have been suppressed under the New York right-to-counsel rule (see People v. Lucas, 53 N.Y. 2d 678). Upon the second trial the petitioner was again convicted of the remaining two murder counts with a judgment rendered thereon on October 28, 1981. On appeal to the New York State Appellate Division, Third Judicial Department, the judgment of conviction after the second trial was affirmed (see People v. Lucas, 105 A.D. 2d 545). An application for permission to appeal to the New York State Court of Appeals was denied by Chief Judge Sol Wachtler by order dated and entered on April 23, 1985.

The opinion of the Supreme Court denying the suppression motions of the petitioner and the co-defendant, RICHARD GRAHAM, is reported at 90 Misc. 2d 1019.

The companion case of RICHARD B. GRAHAM was before this Court on three separate occasions pursuant to writs of certiorari. On the first occasion the United States Supreme Court remanded Graham to the New York State Appellate Division, Third Judicial Department, for further consideration in light of its then-recent holding in Payton v. New York, 445 U.S. 573 (this was in the October Term of 1979, Docket No. 79-6182 with Order dated May 12, 1980). (See Graham v. New York, 446 U.S. 932 [1980].) On remand, the New York State Appellate Division re-affirmed the petitioner Graham's conviction with a decision reported at 76 A.D. 2d 228. On June 28, 1982 petitioner Graham's second

writ of certiorari was decided by this Court and again vacated the judgment of conviction and remanded the same to the New York State Appellate Division for further consideration under the holding in United States v. Johnson, 457 U.S. 537 . On this second remand the Appellate Division re-affirmed the Graham murder conviction with an opinion at 90 A.D. 2d 198 (1982).

The petitioner Graham filed a third writ of certiorari to this Court under Docket No. 83-5147; and by order entered October 11, 1983, the petition for writ of certiorari was denied.

JURISDICTION

The jurisdiction of this Court to review the judgment below rests on 28 U.S.C., Section 1257 (3).

QUESTIONS PRESENTED

(1) Did the Trial Court properly admit on rebuttal testimony the evidence relating to the admissions made by the Petitioner?

(2) Did the seizure of the Petitioner's automobile pursuant to warrant and the subsequent reexamination of the trunk for fingerprints constitute an impermissible second search?

(3) Was the seizure of the Petitioner's automobile and the subsequent reexamination legally permissible under United States vs. Ross, 456 U.S. 798?

(4) Was the Petitioner properly retried on the remaining counts of the Indictment without consituting any double jeopardy claim?

FACTS

The petitioner, along with his co-defendant RICHARD GRAHAM was indicted by the Sullivan County Grand Jury by Indictment No. 67-75 dated December 2, 1975 for two counts of Murder in the Second Degree in violation of §125.25 (1) and (3), one count of Kidnapping in the First Degree in violation of §132.25 (3) and two counts of Robbery in the First Degree in violation of 160.50 (1) and (2) all of the Penal Law of the State of New York.

Prior to trial the defendants moved to suppress the physical evidence seized pursuant to the three search warrants and the search incident to the arrest at the motel rooms in Florida, the confession of the defendant Graham and certain inculpatory statements made by the defendant Lucas. Although the trials had previously been severed pursuant to Court Order, the defendants had agreed that the suppression hearing be held jointly. All parties were given the opportunity to conduct a thorough cross-examination of all witnesses who testified. At the suppression hearing approximately ten full days of testimony was taken over a period of four weeks. Memoranda of Law were submitted. The Honorable Louis B. Scheinman, in a written opinion dated June 16, 1977, denied the defendants' motion to suppress in all respects (see 90 Misc. 2d 1019 [1977]).

The Court of Appeals, at 53 N.Y. 2d 678, determined that the property obtained from the motel rooms and the inculpatory statement of Lucas should have been suppressed. That decision was carried out by the Trial Court prior to the commencement of the second trial.

The second trial against the defendant/appellant, RICHARD LUCAS, commenced on September 21, 1981 before the Hon. Louis B. Scheinman, and the People presented witnesses reconstructing the crime scene, the flight through New Jersey to Florida, the arrest, the recovery of the cash proceeds of the murder and the fingerprints of the victim in the defendant Lucas' automobile.

On October 7, 1981, the jury returned a verdict of guilty for the crimes charged; namely, intentional murder and felony murder. On October 28, 1981 the Court sentenced Lucas to two concurrent twenty-five-year-to-life sentences.

On October 15, 1975, Craig Mitton's body was found on an abandoned piece of property off a dead-end dirt road which was formerly known as the Brookhaven Bungalow Colony, located off Roosa Gap Road, Bloomingburg, New York. Upon investigation, it was determined that Craig Mitton was shot three times by .25 caliber weapon: two bullet wounds to his head and one in his back.

On October 13, 1975 Craig Mitton reported to work as a salesman/courier for courier for Mid-Valley Petroleum Corporation of Newburgh, New York. He had commenced work there effective October 2, 1975 replacing one Richard Graham who was fired on the same date for failing to make a $30,000.00 cash deposit on September 29, 1975. Part of Craig Mitton's duties required the daily collection of cash receipts from the various company-owned gas stations of Mid-Valley Petroleum Corporation. He would then place the cash in locking deposit bags and make a deposit at the First National Bank of Highland, located at the intersection of Route 9W and Chestnut Lane, Newburgh, New York, using the night

depository vault located on the outside of the bank. These were the identical duties that the do-defendant RICHARD GRAHAM had before his firing.

On October 13, 1975, Craig Mitton came to work at the request of Mr. John Alsfeld. Because this was Columbus Day, this normally would have been a day off for the courier and Mr. Alsfeld would have made the daily collection.

On October 13, 1975 Craig Mitton made his daily collections of the various gas stations and prepared his receipts for deposit on four locking bank bags numbered "451", "743" "590" and "206". At approximately 4:30 p.m., using a company-owned vehicle, he left the main office in Newburgh for the First National Bank of Highland to make the deposit of $25,647.10 in the night depository as was the usual procedure.

Since this was Columbus Day, the bank was closed. Further, after examining the bank's records, it was determined and known by October 14, 1975 that the deposit was never made. Additionally, it should be noted at this point that on October 29, 1975 the four locking bags and black briefcase assigned to Craig Mitton were recovered in a wooded area on Stone Castle Road in Newburgh, New York. Richard Lucas was employed by Cooper Jarrett, Inc. as a truck driver in October, 1975, and their truck terminal is located on Stone Castle Road.

On the evening of October 13, 1975 Craig Mitton was reported missing by his wife and also an officer of Mid-Valley Petroleum Corporation. His whereabouts remained unknown until his bullet-ridden body was fortuitously discovered on October 15, 1975 at approximately 1:00 p.m. by two women in the woods picking myrtle.

Thereafter, the New York State Police began an intensive homicide investigation which over the next two days revealed: Richard Graham's relationship to Mid-Valley, a positive identification of Richard Lucas and his Lincoln Continental with another passenger being seen at the First National Bank of Highland at the same time that Craig Mitton was to arrive to make his night deposit, Lucas' violent criminal background, including his very recent need of money and his threat of violence to Gloria Baker, an employee of Mid-Valley Petroleum Corporation; Graham and Lucas; friendship and that they both, along with two female companions, hastily left the Newburgh-Walden area on the early evening of October 13, 1975.

On October 15, 1975 the police located the company-owned vehicle that was assigned to Craig Mitton off a dead-end road in a heavily-wooded area, quite a distance away from where his body was found. Inside the vehicle were the clothes he was wearing on October 13, 1975 when he was last seen alive and his change box which was empty.

The police investigation continued, and in the early morning hours of October 17, 1975, after searching the New York airports and their surrounding areas, found the Lincoln Continental owned by Richard Lucas (being the same vehicle identified at the bank) secreted away in an underground garage at the Downtowner Motel in Newark, New Jersey. Later that day, members of the New York State Police appeared before Superior Court Judge Nicholas Scalera and obtained a search warrant for the Lincoln Continental of of Richard Lucas, whereupon they seized the automobile and its contents which included a shotgun with cartridges, a length of rope and identification of Graham and Lucas.

On October 16, 1975 the police learned that one Georgia Shorey had received a moneygram from Lucas and that it was sent from Fort Lauderdale, Florida. She further related that she was instructed by Lucas not to tell anyone where they were. On October 17, 1975 in the evening, the New York State Police flew to Fort Lauderdale, Florida, and after making contact with the Broward County Sheriff's Department on October 18, 1975, they checked the Western Union Office in Dania, Florida and obtained the address of the defendants. The defendants had registered in the Airport Travel Lodge Motel with the two girls and a Doberman pinscher dog.

On the evening of October 18, 1975 the New York State Police and the Broward County Sheriff's Department kept Rooms 307 and 308 of the motel under surveillance. The defendants were not in their rooms and they did not return to the motel until approximately 6:00 a.m. of October 19, 1975. During the evening hours of October 18, 1975, the New York State Police contacted their headquarters in Middletown, New York, requesting that they obtain arrest warrants and to teletype the Broward County Sheriff's Department confirming the obtaining of the warrants. The proper confirmation was received at approximately 7:00 p.m. of October 18, 1975.

On October 19, 1975 at 8:00 a.m. the police peaceably and without notice entered Rooms 307 and 308, placing the defendants under arrest as being fugitives from justice from the State of New York. The defendants were given Miranda warnings and removed to the Broward County Sheriff's Office where they each executed

Miranda warnings waivers and the defendant Graham gave a detailed taped confession concerning the murder.[1]

The confession revealed that the defendants had been planning the crime several weeks prior to the actual commission; that Graham knew that Mitton would be carrying a large amount of money, being familiar with the operation; that Mitton was abducted in front of the bank and, while alive, placed in the trunk of the Lincoln; that the station wagon was later abandoned on a deserted road. They then arrived at the Brookhaven Bungalow Colony where Graham struck Mitton over the head with a club and while alive, Lucas shot him three times and attempted to shoot more but the gun jammed. Thereafter, Lucas dragged the body off the pathway where he was left to die. The defendants then divided the money, disposed of the bank deposit bags in the woods, picked up the girls and left for New Jersey. The next day they rented safe deposit boxes and placed the cash proceeds of the murder therein and then proceeded to Florida.

Based upon the confession, the police had reason to believe that Craig Mitton was placed in the trunk of the defendant's Lincoln automobile while still alive, so they redusted the inside of the trunk lid on October 20, 1975, finding four fingerprints of the victim. They further obtained two search warrants for each of the banks in New Jersey and recovered the safe deposit boxes rented to each defendant with in excess of $10,000.00 in cash in each box, plus receipts for traveller's checks.

On October 21, 1975 the defendants waived extradition from the State of Florida and returned to New York to stand trial on the charges of murder, kidnapping and robbery of Craig Mitton.

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[1] Due to the confession of the co-defendant, the trial of these defendants was severed and the details of this confession and its very existence were not divulged to the jury.

POINT I

THE TRIAL COURT PROPERLY ADMITTED ON REBUTTAL TESTIMONY THE EVIDENCE RELATING TO THE ADMISSIONS MADE BY THE APPELLANT.

On the airplane back to New York, the defendant was accompanied by Investigator Daniel Reidy. While on the flight, the defendant initiated a conversation with Reidy by asking whether he could discuss the case with the investigator. This conversation was testified to at the trial as follows:

"Q: What, if any, conversation took place after that?

A: Well, Mr. Lucas asked me what he could be charged with and I told him a list of charges which included kidnapping, robbery and murder and then he asked me what kind of sentence he could get for that and I believe I told him three life sentences if he was found guilty on all charges; and then he asked me what kind of guy the District Attorney was in Sullivan County and I told him I really didn't know him personally because I had not worked that much in Sullivan County. He asked me if I could set up a meeting between himself, Mr. Lucas, and the District Attorney because if he could talk to the District Attorney that he could show him that maybe he was there but he didn't do everything. That was basically what he told me."

Immediately thereafter, the Trial Court charged the jury as follows:

"The Court: Ladies and gentlemen, this evidence concerning a statement allegedly made by Mr. Lucas on the airplane, if you find some statement was made, is admitted into evidence, it is admitted into evidence for the purpose of showing an inconsistency between the defendant's testimony on this trial and what he said on another occasion to assist you in determining his believability or credibility. So, its admitted for the purpose of credibility and not for the purpose of truth or untruth of the statement itself."

Initially, the Trial Court at the conclusion of the suppression hearings found that the statement was voluntarily made and was admissible, and was not the product of any police interrogation. The Appellate Division, on appeal after the first trial, at 73 A.D. 2d 699, 700, also found the statement admissible and stated:

"The record supports the finding that the prosecution met its burden of proving that defendant's statement was voluntary and spontaneous and, therefore, admissible."

Subsequently, the Court of Appeals, at 5[illegible] N.Y. 2d 678, reversed the defendant's conviction upon the grounds that the statement made was not spontaneous and, therefore, admitted in violation of the defendant's New York right-to-counsel rule as enunciated in People v. Cunningham, 49 N.Y. 2d 203.

Based upon the above rulings, it is clear therefore that the statement made by the defendant-appellant Lucas to Investigator Reidy was in fact voluntary, as contemplated by the Fifth Amendment of the United States Constitution, as well as conformin to the rules of Miranda. Its suppression was the product solely of the New York rule concerning the attachment of the right to counsel.

At the second trial, the Court ordered that the defendant's statement to Investigator Reidy be suppressed and, therefore, it

was not testified to in the People's case in chief. Investigator Reidy was not permitted to testify to the statement made on the airplane until rebuttal testimony and after the petitioner Lucas testified concerning his version of the events. Immediately after Investigator Reidy's testimony, the Court gave a limited charge to the jury, instructing them that they cannot utlize the petitioner's admissions if they find they were made for the purpose of truthfulness, but only as it affects the issue of credibility.

The cases cited by the petitioner in his brief are inapposite to the legal issues presented here. The petitioner relies upon Portash v. New Jersey, 440 U.S. 450, but in that case the admissions came as a result of a grant of immunity and the Court there determined that it is in essence the same as coerced testimony.

In the instant case, it has clearly been established and accepted as findings of fact throughout all the courts that this petitioner's admissions were in fact voluntary and not the product of any physical coercion or because of any threat of criminal contempt. The Court of Appeals, in People v. Ricco, 56 N.Y. 2d 320 (1982) at page 323, stated:

> "We have heretofore held that prior inconsistent statements, those secured in disregard of constitutional safeguards, nevertheless may be admitted to impeach the credibility of a defendant who chooses to take the stand to testify in contradiction of the contents of the flawed statements (People v. Washington, 51 N.Y. 2d 214, 220; People v. Wise, 46 N.Y. 2d 321, 329; People v. Kulis, 18 N.Y. 2d 318 [denial of arrestee's request to see a lawyer]; see Harris v. New York, 401 U.S. 222; see U.S. Const., 5th, 6th, 14th Amdts; N.Y. Const., Art. 1, §6)."

The Court in Ricco, supra, acknowledged that the exclusionary rule precluded the People from offering Ricco's statements as evidence-in-chief because of a right to counsel violation. The Court went on to say at 326 that:

> "But this did not mean that the statement could not serve other evidentiary purposes. As indicated at the outset of this opinion, once the defendant elected to testify, the People could, and indeed here did, resort to it on cross examination in an effort to impeach his credibility. To paraphrase Oregon v. Hass (420 U.S. 714, 722), 'A shield provided by (failure to respect the right to counsel) is not to be perverted to a license to testify inconsistently, or even perjuriously, free form the risk of confrontation with prior inconsistent utterances."

The Court in Ricco recognized, as was done in this case, that the Trial Court should give a limiting instruction. (The error that occurred in the Ricco case did not involve the rebuttal testimony on the issue of credibility, but rather that the testimony was used to rebut the defendant's insanity defense and, therefore, could not be used against the defendant.)

It should also be noted that in this case when the petitioner Lucas testified, he denied making the alleged admissions that were testified to by Investigator Reidy. He did not deny having a conversation with him on the airplane, but his testimony differed with regard to the contents of that conversation. In People v. Washington, 51 N.Y. 2d 214 (1980), the Trial Court there suppressed a prior inconsistent statement because a defendant had not been advised of his rights under Miranda v. Arizona, 384 U.S. 436, and in fact, the Trial Court made a specific finding that the statements attributed to the defendant were not made. On rebuttal, the People called the

arresting officer who testified concerning the statements allegedly made by the defendant. The Court there held that the prosecutor may, in fact, use the statements on cross-examination or on rebuttal, as was done here. The fact that the defendant denied making the statements or that the Trial Court had deemed them inadmissible, does not preclude their use because the Court noted that whether the defendant made the statements is a factual issue to be resolved by the jury.

The prosecution in the instant case properly called Investigator Reidy to testify on rebuttal concerning the statements made by the petitioner Lucas on the airplane. The Court immediately thereafter gave a proper limiting charge leaving the factual issues to be determined by the trial jury. No error was committed with respect to the admissions of this evidence.

The petitioner's reliance on United States v. Brown, 699 F. 2d 585 (1973) a decision from the Second Cirucit Court of Appeals, is misplaced and does not create any difference of opinion between the New York Court of Appeals and the Federal Courts which need be addressed here. In Brown, the admission that was utilized for impeachment purposes was a post-indictment statement taken from the defendant in violation of his right to counsel. The Court limited its holding to the use of a statement taken from an indicted defendant in violation of the Sixth Amendment right and does not extend its decision to statements taken under other circumstances to include pre-indictment situations (see Brown, supra, at 590).

Since the statement involved herein, which was used for impeachment was pre-indictment, it is not within the ambit of

of the cases cited by the petitioner, nor was it the Trial Court's holdings in conflict with the holding of the United States Second Circuit Court of Appeals in Brown, supra.

POINT II

THE SEIZURE OF THE PETITIONER'S AUTOMOBILE AND THE SUBSEQUENT SEARCH AND ADDITIONAL RE-EXAMINATION FOR FINGERPRINT EVIDENCE WAS CONSTITUTIONALLY PERMISSIBLE.

The New York State Police obtained a search warrant from Hon. Nicholas Scalera, a Superior Court Judge for Essex County, New Jersey, for the defendant's 1974 Lincoln Continental bearing New York Registration No. 900-OHQ. This search warrant was obtained on October 17, 1975, and executed on the vehicle that same day at its location at the Gateway Downtowner Motel, Newark, New Jersey, where the vehicle had initially been observed by the police at approximately 3:00 a.m. of that day and remained under constant surveillance.

Judge Scalera determined that probable cause existed for the issuance of the warrant after hearing sworn testimony by the investigating officers. The search warrant issued for the automobile authorized the search for a .25 caliber pistol, fingerprints, blood stains and other evidence in connection with the homicide. After the search, a return of search warrant was provided to the Court. The validity of the warrant has already been upheld in the companion case of People v. Graham, 69 A.D. 2d 544, 548-549 (1979).

(A) THE ENTIRE LINCOLN CONTINENTAL WAS SEIZED PURSUANT TO THE SEARCH WARRANT

The search warrant that was signed by Judge Scalera authorized a search for ".25 cal, automatic pistol, fingerprints and palmprints, blood stains and other evidence of a

homicide used in connection with the crime of "Murder...." The evidence sought by this warrant was in conformity with C.P.L. §690.10 which lists the type of property that is subject to seizure and specifically, subdivisions 3 and 4, which state as follows:

> "3. Has been used or is possessed for the purpose of being sued, to commit or conceal the commission of an offense; or
>
> 4. Constitutes evidence or tends to demonstrate that an offense was committed or that a particular person participated in the commission of an offense."

The police knew at the time the search warrant was obtained that this particular Lincoln automobile was at the bank at the same time, date and place that the victim was to be there to make his night deposit. The police also knew that the night deposit was not made; that the vehicle the victim was using was abandoned and that the location where his body was found was quite a distance away from where his car was found. Coupled with the other factors constituting probable cause, the police could reasonably infer that the Lincoln Continental was used in some manner for transportation with respect to this murder. Further, the coroner knew that Craig Mitton had been struck on the head and the wound was inflicted while alive due to the extensive bleeding that emanated from it. Knowing this information, the police sought blood-stained evidence.

Based upon the foregoing, the Lincoln Continental clearly became the type of personal property subject to seizure under the search warrant as being "other evidence of a homicide used in connection with the crime of murder".

The petitioner now contends that the Lincoln Continental automobile was not seized at the time the search warrant was initially executed on October 17, 1985. This position is totally contrary to the issuing magistrate's order, the testimony that was adduced at the Suppression Hearing andthe Trial Court's findings.

Further, the police testimony was that after the execution of the search warrant, the Lincoln automobile remained under police surveillance and custody from that point until its removal on October 21, 1975. Lastly, the prosecution has always maintained that the vehicle was searched and seized on October 17, 1974. At the trial, Investigator Graham testified that the police maintained surveillance over the vehicle after the search warrant was executed.

Once the search warrante was executed the car and its contents became evidence in this criminal case and was being retained by the police authorities. At no time was the custody of this vehicle relinquished from the time of the execution of the search warrant and on October 21, 1975 the vehicle and its remaining contents were removed to the New York State Police Barracks located in Middletown, New York, pursuant to Court Order.

Investigator Kenneth Graham kept the keys to the Lincoln automobile at the time the search warrant was executed. The keeping of the keys is indicative of possession, custody and control and this position was maintained throughout the proceedings in this case.

An examination of the search warrant, the search warrant return and the order of Judge Scalera allowing the removal of

property from New Jersey to New York clearly demonstrates that the 1974 Lincoln Continental was properly seized by the law enforcement authorities. This search and seizure occurred on October 17, 1975 at approximately 8:00 p.m. and from that moment on, the vehicle came into the custody and full control of the New York State Police officers and that includes its contents as well.

(B) THE SEUZURE OF THE AUTOMOBILE PERMITTED SUBSEQUENT POLICE EXAMINATION FOR FURTHER EVIDENCE

The petitioner argues that the police conducted an unauthorized search pursuant to a warrant that permitted an overbroad examination of the vehicle and that the police could not re-examine the vehicle for fingerprints on October 20, 1975 after the initial search warrant execution. This position is not supported by the evidence or the law.

The search warrant specifically provided for uncertain enumerated items to include fingerprints and palm prints and "other evidence of a homicide used in connection with the crime of murder." Pursuant to the search warrant, the police seized various items of evidence within the scope thereof and as outlined in the warrant return. Based upon the homicide investigation, the items seized could reasonably have been believed to be involved both evidentiary and for identification purposes in their crime as they included the identified rope, identification of the defents, a shotgun and various rounds of ammunition. Further, the vehicle was dusted for latent fingerprints on its initial seizure of October 17, 1980.

With respect to the dusting of the inside of the trunk lid on October 20, 1975, by Investigator Graham for the purpose of seeking further fingerprint identification, the conduct of the New York State Police at that time was absolutely justified and was not a second entry or seizure with respect to the search warrant.

The police had the Lincoln automobile under surveillance from the moment it was discovered and under their custody and control once the search warrant was executed. As part of the probable cause for the warrant and the reasonable inferences drawn from the facts, the vehicle was used in some manner for the commission of these crimes. The car itself, became evidence along with its contents. The police presence was continuous at the vehicle and their investigation was on-going. The vehicle had already been seized pursuant to the warrant and the warrant permitted the searching for fingerprints and palm print evidence.

When the petitioner and his co-defendant were arrested on October 19, 1975, the defendant Graham's confession related that the deceased had been placed in the trunk of the vehicle while still alive. Based upon this confession, it was determined to have the fingerprint expert re-examine the inside portion of the trunk lid to determine if there was any fingerprint evidence corroborating the confession.

This was not a situation where there were multiple entries into an apartment or dwelling. It is simply a matter of the police reinspecting and examining evidence that has already been seized and within their control for purposes that are convenient

and suitable for their investigation. Whether these items of evidence are examined once, twice or numerous times does not in any way invalidate the already-lawful seizure.

The police conduct in leaving the car in place and maintaining surveillance after the initial search warrant execution was reasonable. The dusting or redusting for fingerprint evidence is a common police practice and again good procedure. The automobile was in fact a part of the "crime scene" and not only did the police have the right but, in fact, had the duty to examine it for additional evidence. This conduct was undertaken on the basis of ample factual justification pursuant to a legitimate and restrained investigation and upon probable cause.

Additionally, this court has considered the same issue raised by this petitioner in the Graham case on second remand from the United States Supreme Court (90 A.D. 2d 198). Concerning the second entry to search and the finding of the fingerprints of Craig Mitton, this Court stated:

> "[6] We next consider the legality of the search of the trunk lid of co-defendant Lucas' car from which the victim's fingerprints were taken on October 20, 1975. The vehicle had been seized, pursuant to a valid search warrant, three days earlier from a public motel parking garage near the Newark airport. An initial search was made which did not reveal the fingerprints...even if we were to hold that the police had exhausted their authority to serach under the warrant by the initial search of the vehicle, new probable cause for the second search was estabilised from the defendant's confession, and the second search may therefore be upheld under United States v. Ross, ___ U.S. ___, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982)."

Once the police have lawfully seized a particular item, the ability to search that item and to analyze it should be determined by the scope of the investigation. It would be absolutely absurd to require, as petitioner suggests here, that the police should be required to obtain a new search warrant every time they sought further examinations of lawfully seized evidence.

Additionally, this contention has been rejected by this Court and the prior applications by the co-defendant Graham in the various writs filed. Furthermore, under the ruling in United States v. Ross, 456 U.S. 798 (1982) it is clear that the police had probable cause to believe that there was evidence concealed within the trunk of the Lucas vehicle based upon the Graham confession and would be able to search this vehicle even without a warrant had that been the case.

POINT III

THE PETITIONER'S ARGUMENT THAT THERE WAS DOUBLE JEOPARDY IN A RE-TRIAL ON TEH CRIME OF FELONY MURDER IS WITHOUT MERIT AND SHOULD NOT BE REVIEWED BY THIS COURT.

Based upon the Court of Appeals' opinion that reversed the first Lucas conviction at 53 N.Y. 2d 678, 681, the Court there made a specific finding that the defendant's contention that the entire Indictment should have been dismissed at the close of trial for lack of legally sufficient evidence was without merit. Based upon these specific findings of fact, there can be no question that there was not a determination going to factual innocence. The Appellate Division, Third Department's dismissal of the robbery and the kidnapping charges clearly did not constitute such a determination. Those charges were dismissed because they were included within the conviction for felony murder under the then-existing law in the State of New York. Subsequent to the original appeal the law has been changed in New York under the case of People v. Berzups, 49 N.Y. 2d 417 where the Court of Appeals has found that the underlying felonies are entirely separate from the felony murder.

Therefore, under the law of the State of New York even a finding of factual innocence for the crimes of kidnapping and/or robbery would not have precluded the subsequent trial for intentional murder and felony murder of this petitioner. The petitioner has failed to set forth any legal or factual basis which should cause this Court to entertain its jurisdiction with respect to this issue.

POINT IV

THE OTHER REMAINING CONTENTIONS BY THE PETITIONER DO NOT RAISE ANY LEGAL OR FACTUAL BASES WHICH SHOULD CAUSE THIS COURT TO ENTERTAIN ITS CERTIORARI JURISDICTION AND REVIEW THE CONVICTIONS OF PETITIONER FOR INTENTIONAL MURDER AND FELONY MURDER.

The petitioner raises several allegations in his petition which he claims would require review by this Court. Some of those allegations deal with the prosecutor's summation, factual determinations involving the suppression and/or introduction of evidence, failute to prove guilt beyond a reasonable doubt and the sentencing Court's determination to punish this petitioner based upon retribution for the aggravated nature of his crime.

There is nothing in the law that mandates either constitutionally or in the State of New York that a defendant receive an absolutely perfect trial. While there may be some things that occurr in a trial or are said in a trial that should not have occurred or have been said, it does not automatically raise it to a level that requires either reversal or certiorari review. All of the allegations made by the petitioner have been reviewed within the State Court system, not once, but twice. There is nothing that he raises now that is any different than what has already been determined by the Appellate Division and the New York STate Court of Appeals to have been fair, proper and which justifies the affirmance of the convictions for murder.

None of the cases cited by the petitioner demonstrate why this Court should entertain certiorari review upon the allegations raised.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari should be denied in all respects.

Dated: Monticello, New York
July 19, 1985

Respectfully submitted,

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